No. 84-1044

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

PACIFIC GAS AND ELECTRIC COMPANY,
Appellant,

v.

PUBLIC UTILITIES COMMISSION OF THE
STATE OF CALIFORNIA,
Appellee.

ON APPEAL FROM THE SUPREME COURT
OF CALIFORNIA

BRIEF OF *AMICI CURIAE* PACIFIC NORTHWEST BELL TELEPHONE COMPANY, PACIFIC POWER & LIGHT COMPANY, AND OREGON INDEPENDENT TELEPHONE ASSOCIATION IN SUPPORT OF PACIFIC GAS AND ELECTRIC COMPANY

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INTERESTS OF *AMICI CURIAE*

This Court has noted probable jurisdiction over Appellant Pacific Gas and Electric Company's ("PGandE") appeal which seeks to overturn California Public Utilities Commission ("CalPUC") Decision No. 83-12-047, as modified by Decision No. 84-05-039 (collectively, "Decisions"). See Appendix to Jurisdictional Statement ("App.") A & B, A-1 through A-61. The Decisions require PGandE to give to TURN, a private association purportedly representing the interests of PGandE's residential customers, free access to "extra space" within

PGandE's billing envelopes. Unfortunately, no court has heretofore reviewed the Decisions, for in early October 1984, the Supreme Court of the State of California denied PGandE's petition for a writ of review.[1] Because of the importance of the questions involved in the PGandE appeal, Pacific Northwest Bell Telephone Company ("PNB"), Pacific Power & Light Company ("Pacific Power"), and Oregon Independent Telephone Association ("OITA"), through their counsel, requested and received consent from all parties to the proceedings below to submit this brief.

Amicus PNB is a Washington corporation providing telephone service to local exchange customers located in Oregon, Washington, and Idaho. Over 700,000 of its customers are located in Oregon. On November 6, 1984, the Oregon electorate enacted an initiative measure, popularly referred to as Ballot Measure 3. The text of Ballot Measure 3 is reprinted in App. J at A-142 through A-150. In essence, Ballot Measure 3 creates an "independent, nonprofit public corporation" known as the "Citizens' Utility Board" ("CUB"),[2] and requires, *inter alia*, that Oregon investor-owned utilities such as PNB allow the CUB to insert its material in such utilities' billing envelopes up to six times per year, all at no cost to the CUB (even if such imposes substantial costs on the utility) so long as the weight of the CUB material does not exceed .4 ounce. Ballot Measure 3 at Sections 10-11, App. J at A-147 and A-148. In addition, Ballot Measure 3 effectively prevents utility customers from obtaining the benefits of technological improvements to the present billing process; Section 12(2), App. J at A-149,

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[1] While a number of states have imposed similar requirements upon regulated utilities, the only other judicial challenge involving the access-to-billing-envelopes concept occurred in New York. On January 4, 1985, the New York Supreme Court, Albany County, issued an order invalidating such a requirement on First Amendment grounds. *Consolidated Edison Co. of New York v. Pub. Serv. Comm'n of New York*, ____ N.Y.S. 2d ____ (slip opinion).

[2] Although Ballot Measure 3 asserts that CUB will be a "nonprofit public corporation funded by voluntary contributions," App. J at A-142, the Oregon Attorney General's participation in this proceeding strongly suggests that all CUB actions (unlike TURN actions) are in fact actions of the State, and accordingly that the CUB must operate under federal constitutional limitations.

prohibits changes to present billing processes if such would hinder the CUB's ability to distribute material. Finally, Sections 12 and 17 of Ballot Measure 3 make "discourag[ing] the distribution of [CUB] material" a Class A misdemeanor, App. J at A-149 and A-150, which under Oregon law is punishable by up to a year's imprisonment and a fine of up to $5000. Or. Rev. Stat §§ 161.635, 161.655. While it is likely that the CUB will use the space in the utilities' billing envelopes in a manner hostile to the utilities' interests, Ballot Measure 3 imposes virtually no restrictions upon the use the CUB can make of the .4 ounce.

Amicus Pacific Power is an assumed business name for the electric operations portion of PacifiCorp, a Maine corporation. Pacific Power provides retail electric service in California, and accordingly is regulated by Appellee CalPUC. Therefore, the precedent established in this proceeding may directly affect Pacific Power's California electric operations. Pacific Power also provides retail electric service to customers located in Oregon, Washington, Idaho, Montana, and Wyoming. Because of its Oregon electric operations, Pacific Power, like PNB, is subject to the provisions of Oregon's Ballot Measure 3.

Amicus OITA is an Oregon nonprofit association composed of independent investor-owned and cooperative telephone utilities. Most OITA members are subject to Oregon's Ballot Measure 3.

A decision from this Court invalidating the Decisions would eliminate the California administrative precendent which could otherwise be injurious to *Amicus* Pacific Power's California electric utility operations. In addition, because Oregon's Ballot Measure 3 is at least as constitutionally infirm as the Decisions which are the subject of the instant

appeal,[3] a decision on the merits in favor of Appellant PGandE would likely terminate the controversy surrounding Ballot Measure 3, which controversy directly and immediately affects all *Amici*.

SUMMARY OF ARGUMENT

Notwithstanding comprehensive state economic regulation, public utility companies are no less entitled to constitutional protections than other, nonregulated businesses. Among the constitutional guarantees available to public utility companies are the First, Fifth, and Fourteenth Amendments to the Constitution of the United States. The Decisions violate each of these constitutional guarantees.

The Decisions violate the First Amendment in that (1) they chill protected political speech by utilities, (2) they compel PGandE to disseminate political views antithetical to its own, (3) they engage in content-based regulation of speech, and (4) they require PGandE to subsidize views antithetical to its own. The Decisions violate the Fifth and Fourteenth Amendments because they sanction the taking of PGandE's private property without just compensation.

[3] For example, it appears that the Decisions attempted to treat PGandE and TURN in a similar manner by requiring each to bear the incremental costs of mailing political advertising. *See* App. A at A-32. Ballot Measure 3, on the other hand, patently requires the utility — and most likely the utility's ratepayers — to pay the incremental costs of postage for CUB materials. This is because the Decisions allocate "extra space" only, while Ballot Measure 3 confers upon CUB an *absolute right* to .4 ounce, *i.e.*, regardless of whether the CUB material would increase postage costs. As Justice Blackmun noted in his dissent in *Consolidated Edison Co. v. Public Service Commission of New York*, 447 U.S. 530, 551-52 (1980), Oregon law prohibits utility ratepayers from paying the costs of utility political advertising. Thus, because Ballot Measure 3 can be construed to confer an advantage to CUB anti-utility political speech which is denied to the utility's own political speech, Ballot Measure 3 appears to discriminate unconstitutionally against utility speech.

ARGUMENT

In recent months, states have used both the legislative and the administrative process to require private, investor-owned utilities to allow third-party access to the utilities' billing envelopes. Such requirements represent a fundamental shift in the long-established balance between public regulation and private enterprise.

Under traditional notions of public utility regulation, private utility companies are subjected to rate regulation in part to avoid monopoly profits. *See* J. Bonbright, *Principles of Public Utility Rates* Ch. 1 (1961). In that ratemaking process, utilities are allowed an opportunity to earn *up to* a specified rate of return upon capital invested in public utility property.[4] It is important to emphasize that a "reasonable" rate is usually intended to be the *maximum* a utility can receive; as the recent financial difficulties encountered by some electric utility companies attest, this opportunity is not to be confused with any guarantee of profitability. If the utility is unable to earn the return authorized by the regulators, it is the utility shareholder, as opposed to the utility customer, who suffers. The same fundamental principle applies to utility expenses — the utility is allowed to recover only those expenses which the regulators find, usually after the fact, to have been prudently incurred. Thus, again, in return for the opportunity to recover up to 100 percent of its costs, the utility bears the risk of justifying that its expenses meet the prudence criterion.

From the foregoing, it is clear that, notwithstanding comprehensive state regulation of public utility companies, such companies retain their private status. As this Court noted as early 1923, the State "is not the owner of property of public utility companies and is not clothed with the general power of management incident to ownership." *Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission of Missouri*, 262 U.S. 276, 289. That utility customers have paid their utility bills does not mean that private property owned by the utility company has become its customers' property. *Board of Public Utility*

[4] CalPUC's Motion to Dismiss asserts that public utilities under California law are given "an assurance of an *opportunity* to earn a reasonable rate of return . . . ." CalPUC Motion to Dismiss at 22 (emphasis added).

Commissioners v. New York Telephone Co., 271 U.S. 23, 32 (1926). The Decisions, however, seem to assume that the state regulatory structure implies utilities' loss of constitutional protections traditionally afforded non-regulated businesses. It is this assumption which constitutes a fundamental departure from traditional norms of public utility regulation — a departure which violates the First, Fifth and Fourteenth Amendments to the United States Constitution.

I. THE DECISIONS VIOLATE THE FIRST AMENDMENT

The First Amendment, made applicable to the States through the Fourteenth Amendment, *Gitlow v. New York*, 268 U.S. 652 (1925), provides: "Congress shall make no law ... abridging the freedom of speech . . . ." The First Amendment protects both an individual's speech and corporate speech. *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

A. The Decisions Must Be Overruled Because They Are Based upon a Fundamental Misinterpretation of Federal Law, Which Misinterpretation Chills Utility Speech.

From the outset, the Decisions have been infected by a fundamental misinterpretation of federal law. Specifically, the Decisions are based upon an erroneous interpretation of Section 113 (b) (5) of the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. § 2623 (b) (5) (1982) ("PURPA"). This misinterpretation has resulted in a dispute of significant constitutional import, and, if allowed to continue, will dramatically chill utilities' speech. The history of this misinterpretation is set forth below.

Section 113 of PURPA establishes "standards" which state regulatory bodies are to consider adopting. Upon adoption, these standards have the force of law. CalPUC adopted the "political advertising" standard of Section 113 (b) (5) of PURPA. *See* Decision 93887 (December 30, 1981), App. D at A-66. PURPA Section 113 (b) (5) provides:

> No electric utility may recover from any person other than the shareholders (or other owners) of such utility any *direct or indirect expenditure* by such utility for promotional or political advertising as defined in section 115(h).

Emphasis added. The critical phrase is italicized — "direct or indirect expenditure." The plain, dictionary meaning of "expenditure" is "The act or process of expending; outlay." *American Heritage Dictionary of the English Language* 462 (1980). Thus, PURPA Section 113 (b) (5), once adopted by a state, prohibits the utility's recovery from utility customers amounts the utility actually paid out for political advertising. The legislative history behind PURPA bears out this plain meaning; the conference report on Section 113 (b) (5) asserts:

> The conferees stress that the standard on advertising prohibits recovery of expenditures for promotional or political advertising from anyone other than the shareholders (or other owners) of the utility, instead of prohibiting recovery from the electric consumers of the utility, as did the House bill. Without this change from the House bill, utilities for which the owners are also the electric consumers, i.e., cooperatives, could be effectively prohibited from undertaking any political or promotional advertising if this standard were adopted. Adoption of the standard does not prohibit any utility from engaging in this kind of advertising. *The standard merely specifies who is to pay for the advertising.*

House Conference Report No. 95-1750 at 77, Pub. L. 95-617 (95th Cong. 2d Sess, 1978), *reprinted in* 6 U.S. Code Cong. & Admin. News 7811 (1978) (emphasis added).

While PURPA Section 113 (b) (5) prohibits *recovery of expenditures*, CalPUC Decision 93887 took that standard a significant step further. CalPUC first reviewed PGandE's *Progress* (a pamphlet intended to provide information to electric consumers; *see* App. N at A-183 *et seq.*), and held that *Progress* constitutes "political advertising" under the definition set forth in PURPA Section 115 (h). App. D at A-66. *Amici* do not contest this determination for purposes of this brief. Also

in Decision 93887, CalPUC concluded that it earlier had adopted PURPA Section 113 (b) (5), which, as noted above, prohibits utilities from recovering political advertising expenditures — outlays — from ratepayers. App. D at A-66. What CalPUC should have done at this point was determine whether, in fact, PGandE had charged its customers for actual outlays associated with *Progress* and, if so, move to allocate such costs, retroactively if necessary, to utility shareholders. CalPUC, however, instead launched into a miasmic search for "value" in the "extra space" of billing envelopes used to carry *Progress*. As CalPUC noted,

> Use of the space for the Progress instead of some other purposes deprives the ratepayers of that "value," which they own. Since PGandE captures that "value" without charge, it is recovering a cost from the ratepayers. We believe such recovery is forbidden under PURPA.

App. D. at A-67. Thus, by equating "extra space" with "value," then bootstrapping this tenuous conclusion into an even more dubious assumption that "value" means "opportunity cost,"[5] which was then stretched to mean "cost," CalPUC was able to convince itself that PGandE had violated PURPA Section 113 (b)(5). In this manner, CalPUC transformed "value" into "opportunity cost" into "cost," and implicitly concluded that the latter term constituted a PURPA Section 113 (b) (5) "expenditure," thus putting PGandE in violation of the PURPA political advertising standard. Once this purported "violation" was found, CalPUC undertook an equally strained search for a remedy; instead of focusing on the remendy Congress obviously intended, *viz.*, shareholder reimbursement of ratepayers, CalPUC in the Decisions conferred a counterbalancing "right of access" to PGand E's "extra space" upon TURN.

Why is this chronology and analysis critically important? Because, as demonstrated above, CalPUC in the Decisions established a rationale based upon an erroneous interpretation of PURPA Section 113(b) (5),

[5] CalPUC was candid enough to admit that the "cost" referred to in the above quotation was not the typical dollars-and-cents type of cost, but rather an "opportunity cost." *See* Decision 98837, App. D at A-68 and A-69.

which rationale, if allowed to stand, will chill utilities' First Amendment right to freedom of speech just as effectively as the New York Public Service Commission's blanket prohibition against utility political speech which this Court overturned in *Consolidated Edison Co. v. Public Service Commission of New York*, 447 U.S. 530 (1980).[6] This is because it is a rare utility indeed which would dare to express *any* opinion on *any* controversial issue at all in a bill insert using "extra space" — a practice this Court expressly found subject to First Amendment guarantees in *Consolidated Edison* — if the likely response was a state-mandated requirement that the utility give free billing-envelope access to political views hostile to its own.

The potential deterrent effect CalPUC's misinterpretation of PURPA Section 113 (b) (5) can have upon utilities' right to freedom of speech is itself a compelling reason for voiding the Decisions. As this Court stated in *NAACP v. Button*, 371 U.S. 415, 433 (1963):

> [First Amendment] freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions.

And when, as in the present case, the sanction is compelled service to hostile political views, deterrence is virtually assured. In sum, the Decisions must be ruled unconstitutional for these reasons alone.

Even *if* the Decisions had been based upon a proper reading of PURPA and *if* no chilling effect upon other utilities' speech would result from the Decisions, this Court should find them unconstitutional infringements upon PGandE's First Amendment rights. The several, independent bases for such a finding are set forth below.

[6] This Court noted:

> Consolidate Edison's status as a privately owned but government regulated monopoly [does not] preclude its assertion of First Amendment rights. . . . We have recognized that the speech of heavily regulated businesses may enjoy constitutional protection. . . . Consolidated Edison's position as a regulated monopoly does not decrease the informative value of its opinions on critical public matters.

447 U.S. at 534 n.1.

B. The Decisions Violate the First Amendment by Compelling PGandE to Disseminate Political Views Hostile to PGandE's Interest.

The First Amendment not only safeguards the right to speech, it also protects one's choice *not* to speak. Thus, in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), this Court invalidated a Florida requirement that a newspaper publish a political message submitted by a third party. Even more directly on point, in *Wooley v. Maynard*, 430 U.S. 705 (1977), this Court declared unconstitutional a New Hampshire requirement that passenger vehicles licensed in the state bear plates with the motto, "Live Free or Die." Appellee Maynard challenged this requirement by placing opaque tape over the motto. In determing that the appellee Maynard could not be compelled to advertise material he found "politically abhorrent," 430 U.S. at 713, this Court began with the

> proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all. A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts. *The right to speak and the right to refrain from speaking are complementary components of the broader concept of "individual freedom of mind."*

430 U.S. at 714 (emphasis added, citations omitted). The Court noted that *because* the motto was a popular expression of political sentiment in the State, there was a heightened need for constitutional protections. 430 U.S. at 715. Accordingly, upon determing that First Amendment principles were implicated, the consequent question became whether the State had a compelling interest in requiring display of the political motto.

New Hampshire proposed two justifications for requiring motorists to display the motto. First, the State argued that because the motto was printed only on passenger vehicle plates, it facilitated law enforcement authorities' identification of properly licensed vehicles. 430 U.S. at 716. Second, the State admitted seeking to communicate its official view of proper ideology. This Court disposed of the first claim by noting that identification of properly licensed vehicles could easily be accomplished by means not intrusive upon appellee Maynard's right not to associate himself with the motto. In disposing of the second State justification, the Court noted,

> [W]here the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message.

430 U.S. at 717 (footnote omitted). Finally, in a footnote, the Court distinguished its holding voiding the required display of the State's motto on license plates from the question of whether the national motto "In God We Trust" would also be declared unconstitutional by noting that, because of the very nature of currency, its bearer is "not required to publicly advertise the national motto." 430 U.S. at 717 n.15.

Application of the *Wooley* criteria makes it manifest that the Decisions cannot withstand scrutiny under the First Amendment. Access to PGandE's billing envelopes is granted not only to facilitate dissemination of political views antithetical to PGandE's, but also to *urge action* upon those views. Unlike the motorist Maynard, those who receive TURN's views are solicited to political activity *intended* to be hostile to the courier's — PGandE's — interest. Thus, if First Amendment implications were raised in *Wooley* by merely requiring display of political views, *i.e.*, in the absense of incitement to political action, such intended incitement as in this case raises even more fundamental First Amendment concerns.

As noted above, once First Amendment principles are implicated, the analysis shifts to the question of whether there is a compelling state interest; this, in turn, raises the question of what State interest the CalPUC is seeking to serve by the Decisions. Starting at the most basic level, the Decisions merely provide an economic and political subsidy to a private political-action group, TURN. For example, TURN will not have to bear the costs all other, non-favored interest groups have to bear in reaching potential members. In addition, TURN

will automatically gain access to PGandE's customer lists — items normally thought to be of both political and economic value.[7] At the most ethereal level, the Decisions might be thought to advance the nebulous ideology of "consumerism." Nowhere along this scale of possible interests can even a close-to-compelling State interest be found. For example, TURN can easily solicit members just as all other political-action groups do — through its *own* mailing program, and at its own cost. Certainly envelopes are not in scarce supply, and utility customers could be reached through mass mailings to every household. Turning to less intrusive means, the State of California could subsidize TURN and still avoid most First Amendment implications by appropriating taxpayer funds to defray costs of an independent TURN mailing. *See* 430 U.S. at 721 (Rehnquist, J., dissenting). Furthermore, attention should also be focused upon the means the Decisions employ to secure compliance: As in *Wooley*, severe sanctions may follow PGandE's refusal to display or disseminate material. In California, the penalty for violation of a CalPUC order is a fine of up to $1,000 or imprisonment for one year, or both. Cal. Pub. Util. Code § 2110 (West) (1975). Finally, addressing the Court's comments distinguishing license plates from currency, the sole reason that utility bill inserts are sought by political-action groups is *because* utility bills demand attention; unlike currency, which is "generally carried in a purse or pocket and need not be displayed to the public," 430 U.S. at 717 n.15, utility billing materials are designed to — and do — communicate specific information important to the recipient. *See* CalPUC Motion to Dismiss at 20.

In sum and in substance, the Decisions constitute an unconstitutional infringement upon PGandE's right to refrain from speaking by compelling PGandE to disseminate views hostile to its own. *Wooley* alone is a compelling basis for invalidation of the Decisions. A second, closely related ground for invalidation also exists — that the Decisions unconstitutionally engage in content-based regulation of speech.

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[7] CalPUC itself admits the value of these lists by noting that consumer organizations generally do not "have a way of reaching that 'captive' audience in a manner which demands its special attention to [the consumer organization's] message." CalPUC Motion to Dismiss at 20.

C. The Decisions Violate the First Amendment by Engaging in Content-Based Regulation of Speech.

In 1980, this Court in *Consolidated Edison Co. of New York v. Public Service Commission of New York*, 447 U.S. 530 (1980), held that state regulatory authorities may not prohibit electric utility companies from using their own billing envelopes to disseminate political messages. To reach this conclusion, the Court first explicitly found that utilities are entitled to freedom of speech. The Court emphasized that the State has no business involving itself with the content of such speech:

> The First and Fourtheenth Amendments remove "governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us . . . ."

447 U.S. at 534 (emphasis added), quoting *Cohen v. California*, 403 U.S. 15, 24 (1971). After noting that reasonable time, place and manner restrictions are often upheld, the Court added a critical caveat:

> But when regulation is based on the content of speech, governmental action must be scrutinized more carefully to ensure that communication has not been prohibited "merely because public officials disapprove the speaker's views." . . . . Governmental action that regulates speech on the basis of its subject matter ' "slip[s] from the neutrality of time, place, and circumstance into a concern about content." '

447 U.S. at 536 (citations omitted). As is demonstrated below, the Decisions cannot withstand the hard scrutiny mandated by *Consolidated Edison*.

First, the expected content of TURN's political messages is the Decisions' *raison d'etre*; had not TURN appeared willing — indeed, delighted — to take up the political cudgel against PGandE, TURN would not have been the subject of CalPUC's largesse. Thus, the content of speech figures prominently in the Decisions.

The second question the Court addressed in *Consolidated Edison* was whether a content-neutral prohibition of speech could survive the hard scrutiny mandated by the First Amendment. This issue, of course, has no bearing on the present controversy, for the Decisions go further than merely prohibiting speech; in effect, the Decisions compel PGandE to provide favored treatment to TURN's hostile political views. Because there are no subject matter restrictions involved in the controversy,[8] the remaining question becomes whether the Decisions constitute a narrowly tailored exercise of appropriate police powers.

CalPUC may well attempt to justify its forced assistance to TURN by asserting that, because PGandE inserted *Progress* into its billing envelopes, CalPUC thereby became entitled to "balance" the use of *Progress* by the forced insertion of TURN materials. See Motion to Dismiss at 18. There is a fatal flaw in such a justification, *viz.*, that CalPUC certainly had less restrictive means available to it — none of which implicated First Amendment values — to remedy an assumed violation of PURPA.[9] For example, as is pointed out in this brief at 5-6, *supra*, traditional ratemaking notions allow regulators to disallow expenses incurred by utilities, which disallowance

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[8] But see the discussion of the discriminatory impact Oregon's Ballot Measure 3 will have upon ratepayer subsidization of CUB's political speech, *supra* at 4 n.3.

[9] While the states are generally to be afforded discretion is discharging state regulatory functions, when First Amendment values are implicated the question becomes whether the policy objectives of the State could have been accomplished without affecting such values. Thus, in *Shelton v. Tucker*, 364 U.S. 479 (1960), this Court on First Amendment grounds invalidated a State requirement that all teachers disclose affiliations with all organizations. The Court said,

> In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same purpose.

364 U.S. at 488 (footnotes omitted). It is clear that the end desired by CalPUC — assistance to TURN — can be achieved through a variety of means, none of which affect PGandE's First Amendment rights.

automatically shifts such expenses to shareholders. Thus, for example, the New York Public Service Commission issued an order requiring utility shareholders to pay one-half the total cost of a particular mailing if the mailing contains the utility's political advertising. This order was recently upheld by the Appellate Division. *Consolidated Edison Co. of New York v. Public Service Commission of New York*, 485 App. Div. 3d 73 (1985). In the case of CalPUC, it merely had to wait for the next rate case to disallow all costs related to preparation, insertion and delivery of *Progress*. Or, if CalPUC wished speedier action, it could have instituted on its own motion a complaint proceeding against PGandE for its inclusion of *Progress*. *See* Cal. Pub. Util. Code § 1702 (West)(1975). As it is, CalPUC chose the most intrusive means, a choice which also expressly violates the First Amendment principles established in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), discussed below.

In *Miami Herald*, a Florida newspaper had published material critical of a candidate for statewide office. A state statute granted such a candidate a right to "equal space" to respond, and when the newspaper refused such space, litigation ensued. While lower state courts concluded that the statute was unconstitutional, the Florida Supreme Court reversed, upholding the statute. 418 U.S. at 245-46. This Court, after overcoming questions of finality, reversed the Florida Supreme Court's holding and declared the Florida statute unconstitutional. As in the instant proceeding, the proponents of constitutionality asserted that the statute increased the free flow of information to the public. 418 U.S. at 247-48. As noted by the Court,

> The First Amendment interest of the public in being informed is said to be in peril because the "marketplace of ideas" is today a monopoly controlled by the owners of the market.

418 U.S. at 251. In response, this Court asserted with a statement which seems tailored to the present controversy:

> However much validity may be found in these arguments, at each point the implementation of a remedy *such as an enforceable right of access* necessarily calls for some mechanism, either governmental or consensual. If it is governmental coercion, this at once brings about a confrontation with the express provisions of the First Amendment and the judicial gloss on that Amendment developed over the years.

418 U.S. at 254 (footnotes omitted, emphasis added). Because the Decisions chose the most restrictive means of responding to PGandE's insertion of *Progress* into its own billing envelopes, *i.e.*, by giving an "enforceable right of access" to TURN in express violation of the First Amendment principles enunciated in *Miami Herald*, the Decisions must be invalidated.

D. The Decisions Violate the First Amendment by Requiring PGandE to Subsidize Political Views Antithetical to Its Own.

The Decisions require that PGandE use its own billing envelopes and machinery to disseminate political views of TURN, an entity whose policies are antithetical to PGandE's. Added to the clear economic benefit conferred *gratis* upon TURN is the impact utility billing envelopes carry. In short, PGandE is being compelled by the State to contribute to the advancement of TURN's political views. This compulsion runs counter to this Court's decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977).

In *Abood*, the State of Michigan required every public employee to pay a service fee to a union regardless of union membership. The union used part of that fee to support political activity, to which certain employees objected. Addressing the issue of compelled financial support of political actions, this Court held:

> The fact that appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights. For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State.

431 U.S. at 234-35 (footnote omitted).

To reiterate, it is utility property which is being employed to confer distinct economic benefits upon TURN. As this Court noted in *Board of Public Utility Commissioners v. New York Telephone Co.*, 271 U.S. 23, 32 (1926), utility customers' payment of their utility bills does not transfer ownership of the utility's property to such customers. Moreover, it is clear that just as they are repugnant to PGandE's political views, the political views espoused by TURN simply will not be acceptable to all of PGandE's customers;[10] accordingly, even if it *is* assumed that PGandE's customers as a group somehow are entitled to use PGandE's billing envelopes — an assumption which certainly is not admitted — under *Abood*, the envelopes may not be used to subsidize political views with which *some* customers disagree. For these reasons, the Decisions violate the First Amendment principles established in *Abood*.

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[10] CalPUC's Motion to Dismiss highlights both the reasons behind the sensitive nature of utility's customer lists and how the Decisions appear to circumvent state constitutional norms. Footnote 20 of the Motion to Dismiss states:

> It is doubtful whether PGandE can properly disclose, or be ordered to disclose, to consumer groups the names and addresses of its customers. Cal. Const. art. I, § 1, explicitly guarantees the right of privacy to all California citizens, and only recently, in *People v. Chapman*, 36 Cal.3d 98, 113, 201 Cal.Rptr. 628, 679 P.2d 62 (1984), the California Supreme Court held that a utility customer had a reasonable expectation of privacy in unlisted information concerning his name and address, and that the warrantless disclosure of this information violated the search and seizure provisions of Cal. Const. art. I, § 13. Accordingly, the Commission's decision here appears to be the only reasonable way of providing consumer groups with access to the direct mail forum while accommodating the state constitutional privacy rights of the ratepayers. The state, of course, has a significant, if not compelling, interest, *see Widmar v. Vincent*, 454 U.S. 263, 275-276 and n. 17 (1981), in complying with its own constitution.

II. The Decisions Violate the Fifth and Fourteenth Amendments.

The Fifth Amendment provides: "[N]or shall private property be taken for public use, without just compensation." The Fifth Amendment is applicable to the states through the Fourteenth Amendment. *Chicago, Burlington and Quincy Railroad Co. v. Chicago*, 166 U.S. 226 (1897). Because no compensation, just or otherwise, has been offered PGandE for the use of its envelopes, this portion of the brief addresses the first two elements of a Fifth Amendment violation, *viz.*, (1) private property (2) taken for a public use.

Private property is involved. Like nonregulated businesses, PGandE sells its commodities to the public. If PGandE's billing envelopes belonged to a nonregulated business, there would be little doubt that the envelopes constitute private property. A question is raised in this area only because PGandE is a regulated entity. The cost of mailing bills, including the cost of purchasing the envelope, is almost invariably included in the cost of service for ratemaking purposes, just as nonregulated businesses pass along their billing expenses to their customers. Merely because a utility is compensated for the use of its property through a formal ratemaking process, however, does not mean that its property ceases to be private property.

As was pointed out in the introduction of this brief, the principle that utility property is not ratepayer property has been expressly recognized by this Court. *Board of Public Utility Commissioners v. New York Telephone Co.*, 271 U.S. 23 (1926). In that case, the Court examined whether certain rates were sufficient to allow the utility to obtain a reasonable return on the property used for public service. The Court noted that the customers pay for the service, not for the property used to render the service:

> By paying bills for service [customers] do not acquire any interest, legal or equitable, in the property used for their convenience or in the funds of the company.

271 U.S. at 32. The Court went on to conclude that the property belongs to the utility, whether the property is paid for by issuing stocks and bonds, or through funds received as payment for service. *Id.*

Moreover, this Court's recent decision in *Consolidated Edison Co. v. Public Service Commission of New York*, 447 U.S. 530 (1980), noted that the utility was using "*its own billing envelopes* to promulgate its views on controversial issues of public policy." 447 U.S. at 540 (emphasis added). This statement strongly suggests that a utility billing envelope is perceived to be the utility's private property.[11]

The second element is a "taking." This Court has announced that there is no set formula for determining when a taking has occurred, and that each decision must turn upon a consideration of the circumstances involved. *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978). However, the Court noted that the character of the government's action would carry particular weight in determining whether a taking had occurred. If there has been a physical invasion of the owner's property, a taking probably has occurred. *Id.*

The Court has long recognized that a governmental taking need not involve a governmental acquisition of title. *United States v. General Motors Corp.*, 323 U.S. 373 (1945) (temporary occupancy of leased building). Interference with the owner's right to use his property is a compensable taking. *Id.* More recently, the Court has noted that the fact that there is only a slight economic impact on the owner, or that only a very small area is occupied, does not preclude a finding that there has been a compensable governmental taking. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434-37 (1982) (cable installation on private building pursuant to state law held to be taking). The Court further stated in *Loretto* that if the government

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[11] Notwithstanding these precedents, CalPUC concluded that, "Since the extra space in PG&E's billing envelopes is not property of PG&E, its taking arguments are not meritorious." App. B at A-52. CalPUC's conclusion can only be termed bizarre. If utility customers have a "right" to "extra space" in utility billing envelopes, they also have at least as great a right to such nonsensitive, nonpolitical "extra spaces" as are found in a utility truck front seat (May CalPUC require PGandE to ferry its customers to and fro whenever PGandE vehicles are not fully occupied?) or to occupy free of charge space in its business buildings which are temporarily empty. In sum, CalPUC's "no property" analysis, even when applied to areas in which no sensitive First Amendment values are at stake, is a radical departure from existing property law.

required the property owner to allow another person to have access to the owner's property, that would add "insult to injury." 458 U.S. at 436. Of course, the insult of *Loretto* did not implicate sensitive First Amendment values.

Stating the same concept another way, this Court has held that the right to exclude others from one's private property is a fundamental element of property rights. *Kaiser Aetna v. United States*, 444 U.S. 164 (1979). In that case, the Court held that the government can not require an owner to allow free access to the owner's private property, unless the government pays a just compensation to the owner for taking away the owner's right to exclude. *Id.*[12]

Although the Court's "taking" cases focus on governmental interferences with an owner's right in real property, the concepts are equally applicable to governmental interference with personal property. By mandating that PGandE must allow TURN to place its materials in the utility's billing envelope, the State is interfering with the utility's own use of the envelope. In *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), the Court found that New York's designation of a landmark was not a taking because it "in nowise impaired the present use" of the defendant's property. 431 U.S. at 135. In contrast, requiring PGandE to relinquish part of its envelope space to TURN definitely impairs the utility's "present use" of its property, therefore raising the claim that the State is taking utility

[12] On the other hand, shortly following *Kaiser Aetna*, in *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), this Court held that there was not taking when a shopping center owner was prohibited by the state from barring political activities in his shopping center. In reaching this decision, the Court focused upon the owner's investment expectations, and found that others' use of the center for political purposes would not unreasonably impair its use as a shopping center. Of course, in contrast to a shopping center open to the public, a billing envelope is a private medium of communication. Moreover, in *PruneYard*, the Court was careful to note that such public use may *not* contravene any other federal constitutional provision, 447 U.S. at 81, and that the shopping center owner's investment expectations would not be upset by the allowing access. 447 U.S. at 83. Both because of the differing expectation of privacy involved in a shopping center on the one hand and an envelope on the other, and because PGandE's stockholders' expectations *would* be upset by TURN's forced access to PGandE's envelopes, the *PruneYard* decision cannot justify TURN's invasion of PGandE's billing envelopes.

property. Indeed, under the Decisions, the State is not merely going to use PGandE's envelope for its own purposes, it is requiring that PGandE allow a *private* third party to have access to the utility's property.[13] Finally, the Decisions require PGandE to allow free access to the utility's property. Under the reasoning of *Kaiser Aetna, supra*, it could be argued that the State must at least pay the utility just compensation for taking away the utility's right to exclude others from utility property. 444 U.S. at 181. CalPUC has failed to do so, and thereby has violated the Fifth Amendment.

[13] Once again, as was stated in *Loretto, supra*, such a governmental action adds "insult to injury." 458 U.S. at 435-36.

CONCLUSION

CalPUC's 1981 error in construing PURPA Section 113(b) (5) led directly to the Decisions; without that misinterpretation of the meaning of "expenditure," it is unlikely that this controversy would have arisen at all. As the twig was bent, however, so grew the tree. If allowed to stand, the Decisions will chill other utilities from ever using the "extra space" in their billing envelopes to comment upon controversial issues of public importance. This chilling effect will be every bit as effective as the outright New York prohibition of such utility speech this Court invalidated in *Consolidated Edison*; for this reason alone, the Decisions should be set aside. Strong, additional First Amendment grounds for voiding the Decisions are also present. The Decisions compel PGandE to disseminate political views hostile to its own in violation of *Wooley v. Maynard*, constitute unconstitutional content-based regulation of speech in violation of *Miami Herald Publishing Co. v. Tornillo*, and violate the principles in *Abood v. Detroit Board of Education* by compelling PGandE to subsidize political views with which it disagrees. Finally, the Decisions violate the Fifth Amendment in that they take PGandE's property without just compensation. For all these reasons, this Court should declare the Decisions unconstitutional and therefore void.

Respectfully submitted,

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